THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MARK A. ARTHUR, CIRILO MARTINEZ, and PARI NAJAFI on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SALLIE MAE, INC.,

Defendant.

CLASS ACTION

NO. 10-cv-00198-JLR

PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT

Noted for Consideration: December 17, 2010, 9:30 a.m.

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND RELIEF REQUESTED 1

II. AUTHORITY AND ARGUMENT 1

A. The Settlement Is Fair, Adequate, and Reasonable 3

1. The Settlement Offers Substantial Benefits, While Continued Litigation Poses Considerable Risks 5

2. The Substantial Amount of Discovery Completed Supports Final Approval of the Settlement 7

3. The Positive Recommendation and Extensive Experience of Counsel Support Final Approval of the Settlement 9

4. Future Expense and Likely Duration of Litigation Support Final Approval of the Settlement 9

5. Small Number of Objectors and Nature of the Objections Support Final Approval 10

6. Presence of Good Faith, the Absence of Collusion, and the Approval of a Third-Party Mediator Support Final Approval of the Settlement 11

B. The Class Members Have Received the Best Notice Practicable. 12

C. Few Class Members Have Chosen to Opt-Out of the Settlement 13

D. At Least 55,974 Settlement Class Members Have Accepted Settlement Relief 14

III. CONCLUSION 14

TABLE OF AUTHORITIES

PAGE

CASES

Class Plaintiffs v. City of Seattle,
955 F.2d 1268 (9th Cir. 1992) 2, 10, 14

Fulford v. Logitech, Inc.,
2010 U.S. Dist. LEXIS 29042 (N.D. Cal. Mar. 5, 2010) 7

Garner v. State Farm Mut. Ins. Co.,
2010 WL 1687832 (N.D. Cal. Apr. 22, 2010) 2

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 3

Hughes v. Microsoft Corp.,
2001 WL 34089697 (W.D. Wash. Mar. 26, 2001) 9, 11

In re Critical Path, Inc.,
2002 WL 32627559 (N.D. Cal. June 18, 2002) 7

In re Mego Fin. Corp. Secs. Litig.,
213 F.3d 454 (9th Cir. 2000) 7

In re Phenylpropanolamine (PPA) Prods. Liab. Litig.,
227 F.R.D. 553, 567 (W.D. Wash. 2004) 3, 9, 11

Kavu, Inc. v. Omnipak Corp.,
246 F.R.D. 642 (W.D. Wash. 2007) 6

Kenro, Inc. v. Fax Daily, Inc.,
962 F. Supp. 1162 (S.D. Ind. 1997) 6

Knight v. Red Door Salons, Inc.,
2009 WL 248367 (N.D. Cal. Feb. 2, 2009) 2, 7

Lelsz v. Kavanagh,
783 F. Supp. 286 (N.D. Tex. 1991) 10

Linney v. Cellular Alaska P'ship,
151 F.3d 1234 (9th Cir. 1998) 7

Marshall v. Holiday Magic, Inc.,
550 F.2d 1173 (9th Cir. 1977) 10

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615 (9th Cir. 1982) 2, 9

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 3, 11

Parker v. Anderson,
667 F.2d 1204 (5th Cir. 1982) 10

Pelletz v. Weyerhaeuser Co.,
255 F.R.D. 537 (W.D. Wash. 2009) 3, 7, 8, 9

Rodriguez v. West Publ'g Corp.,
563 F.3d 948 (9th Cir. 2009) 7

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Silber v. Mabon,
18 F.3d 1449 (9th Cir. 1994) 13

Vasquez v. Coast Valley Roofing, Inc.,
266 F.R.D. 482 (E.D. Cal. 2010) 5

Young v. Katz,
447 F.2d 431 (5th Cir. 1971) 9

STATUTES

47 U.S.C.
§ 227(b)(1)(A) 1, 5

OTHER AUTHORITIES

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) 5

RULES

Federal Rules of Civil Procedure
Rule 23(e)(1)(A) 2

TREATISE

2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*
§ 11.43 "General Criteria for Settlement Approval" (3d ed. 1992) 2

4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*
§ 11.41 (4th ed. 2002) 2, 14

Manual for Complex Litigation (Third) § 30.42 (1995) 9

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs respectfully submit this memorandum in support of final approval of the proposed Settlement Agreement, submitted previously with Plaintiffs' motion for preliminary approval. The Settlement resolves all claims in this matter against Defendant Sallie Mae, Inc. ("Sallie Mae").

Plaintiffs brought these claims on behalf of themselves and all others similarly situated alleging that Sallie Mae, Inc. and/or subsidiaries or affiliates of Sallie Mae, Inc. (collectively, "Sallie Mae"), called Plaintiffs and Class Members on their cellular telephones through the use of automatic telephone dialing systems and/or using an artificial or prerecorded voice without their prior express consent. Specifically, Plaintiffs allege that such calls violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A).

As described in Plaintiffs' Unopposed Motion of Preliminary Settlement Approval, the Settlement's main focus is significant prospective practice changes requiring Sallie Mae not to make calls to the cellular telephones of Class Members who complete a simple, one-page form. The Settlement also requires Sallie Mae to pay at least $19.63 million. Arthur Counsel[1] and Sallie Mae have engaged in extensive informal discovery and evaluation of Plaintiffs' claims, and exchanged pertinent information that would have been available under the usual discovery procedures.

With this motion, Plaintiffs seek final approval of the Settlement Agreement. As discussed in detail below, the proposed Settlement satisfies all criteria for final settlement approval under Ninth Circuit law.

II. AUTHORITY AND ARGUMENT

Before granting final approval of a class action settlement, a reviewing court must first

[1] "Arthur Counsel," as used herein, shall refer to the firms of Terrell Marshall & Daudt, PLLC; Lieff Cabraser Heimann & Bernstein, LLP; and David P. Meyer & Associates Co., LPA.

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find the settlement "is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(A); *see also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting that "strong judicial policy . . . favors settlements, particularly where complex class action litigation is concerned"); *see also* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed. 2002) (gathering cases). In evaluating whether a class settlement is "fair, adequate, and reasonable," courts generally refer to eight criteria, with differing degrees of emphasis: the likelihood of success by plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and the absence of collusion. 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*") § 11.43 "General Criteria for Settlement Approval" (3d ed. 1992). This list is "not exhaustive, nor will each factor be relevant in every case….The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)).

"A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Knight v. Red Door Salons, Inc.*, No. C-08-1520-SC, 2009 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009); *see also Garner v. State Farm Mut. Ins. Co.*, No. C-08-1365-CW (EMC), 2010 WL 1687832, at *13 (N.D. Cal. Apr. 22, 2010) ("Where a settlement is the product of arms-length negotiations conducted by capable and experienced counsel, the court begins its analysis with a presumption that the settlement is fair and reasonable."). This is because "[t]he extent of the discovery conducted to date and the stage of the litigation are both indicators of counsel's familiarity with the case and of Plaintiffs having enough information to make informed decisions." *Knight*, 2009 248367, at *4.

In the end, "[s]ettlement is the offspring of compromise; the question we address is not

whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998), *quoted in Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 544 (W.D. Wash. 2009). Here, the record before the Court demonstrates that the settlement agreement satisfies this standard and that final approval is appropriate.

A. The Settlement Is Fair, Adequate, and Reasonable

The Court should begin its analysis with a presumption that the settlement between Plaintiffs and Sallie Mae is fair, adequate, and reasonable. Arm's-length negotiations conducted by competent counsel after extensive discovery are *prima-facie* evidence of a settlement that is fair and reasonable. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 567 (W.D. Wash. 2004). These factors are well satisfied here.

To reach this settlement, the parties to this action engaged in extensive negotiations over an eleven-month period, including four lengthy and contentious in-person mediated settlement negotiations before The Honorable Edward I. Infante (Ret.). Declaration of Jonathan D. Selbin ("Selbin Decl.") at ¶ 26-28. The discussions culminated in the September 2, 2010 Settlement Agreement ("Agreement"), which is on file with the Court. *Id.*, Exh. B; Dkt. No. 32 at 35-63 (Exhibit 1). The Settlement's main focus is significant prospective practice changes requiring Sallie Mae not to make calls to the cellular telephones of Class Members who complete a simple, one-page form. The Settlement also requires Sallie Mae to: (1) pay at least $19.5 million into a settlement fund ("Fund"), out of which eligible Class Members who file qualified claims will receive Monetary Awards, (2) pay $85,000 for a dedicated *cy pres* contribution to cover the claims of certain Class Members who do not have, and never have had, lending or servicing relationships with Sallie Mae, and (3) pay $45,000 for additional, targeted publication notice to reach those Class Members. This $19.63 million Fund includes any approved enhancement payments to the Class representatives, attorneys' fees and costs, and the expenses associated with

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providing notice to the Class and administering Class claims, both of which are being handled by The Garden City Group, Inc. ("Claims Administrator").

The Settlement is the result of a thorough and extensive investigation, informal discovery, and an evaluation of Plaintiffs' claims. Selbin Decl. at ¶¶ 8-39. Unlike many cases involving consumer claims and products, this case turns largely on a purely legal issue: whether the TCPA and/or the FCC's Declaratory Ruling permit "prior express consent" to be given after loan origination and/or verbally. *Id.* at ¶ 12. Accordingly, Arthur Counsel's primary focus through months of settlement discussions was on resolving that legal question. *Id.* How a court would determine that purely legal issue would, to a large extent, determine whether or not Plaintiffs' TCPA claims would be successful. *Id.* Plaintiffs' success would be all or nothing as Sallie Mae could effectively reduce the recoverable damages or eliminate them altogether if its interpretation prevailed. *See id.* at ¶¶ 12, 30.

Thus, while this case did not involve substantial factual discovery, there was sufficient discovery in light of the nature of the case. Selbin Decl. at ¶ 13. While Plaintiff Arthur did not file this action until February 2010, Arthur Counsel's investigation began in August 2009 and extensive pre-filing exchange of views and negotiation with Sallie Mae began in October 2009. *Id.* at ¶¶ 9-10. These meaningful settlement discussions were punctuated by four lengthy, in-person, hotly contested, mediated settlement discussions before the Honorable Edward A. Infante (Ret.) in April, May, and June 2010. *Id.* at ¶ 9-12, 26-30. Over the course of settlement negotiations, Arthur Counsel and Sallie Mae exchanged information and documents that would have been available under usual discovery procedures, including client loan records, form loan applications and promissory notes in use during the class period, and case law and relevant rulemaking by the FCC. *Id.* at ¶¶ 11-13, 23-25, 37-38. This exchange of information and documents permitted Arthur Counsel to further analyze the legal and factual bases for their claims. *See id.* Arthur Counsel also interviewed and collected relevant information and documents from over 100 affected class members. *Id.* at ¶¶ 13, 17, 31. Both sides were well-

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informed regarding the strengths and weaknesses of their respective positions. *See id.* at ¶¶ 8-39.

As the Court recognized in its preliminary approval order, "the Agreement resulted from extensive arm's length negotiations." (Dkt. No. 39 ¶ 1.) Moreover, as addressed individually below, the Settlement satisfies each of the criteria identified in *Newberg*.

1. The Settlement Offers Substantial Benefits, While Continued Litigation Poses Considerable Risks

The benefits of settlement and plaintiffs' chances of success are typically evaluated together. *See, e.g.*, *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 488 (E.D. Cal. 2010) ("An important consideration in judging the reasonableness of a settlement is the strength of the plaintiffs' case on the merits balanced against the amount offered in the settlement.") (internal quotation marks omitted). Plaintiffs alleged that Sallie Mae called Plaintiffs and Class Members on their cellular telephones through the use of automatic telephone dialing systems and/or using an artificial or prerecorded voice without their prior express consent in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A). Through discovery, Plaintiffs developed substantial evidence tending to show that Sallie Mae called Plaintiffs and Class Members on their cellular telephones through the use of automatic telephone dialing systems and/or using an artificial or prerecorded voice.

However, Plaintiffs faced the risk of dismissal at a very early stage in this litigation. This case turns on competing interpretations of, among other things, the FCC's January 4, 2008 declaratory ruling, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (hereinafter "Declaratory Ruling"). The Declaratory Ruling is the FCC's official interpretation of the governing provisions of the TCPA. The FCC's Declaratory Ruling addresses the meaning of "prior express consent" and states: "prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed." *Id.* at

¶ 10. Plaintiffs maintain that Paragraph 10 requires that the cell phone number be "provided during the transaction that resulted in the debt owed," *i.e.* during loan "origination."

Sallie Mae, however, has interpreted the term "transaction" broadly to mean any time during the multi-year life of the loan. Sallie Mae has therefore steadfastly maintained that some or all of the Class Members gave Sallie Mae prior express consent to contact them at their cellular phone numbers. Selbin Decl. at ¶ 30. If the Court found that the FCC's Declaratory Ruling and/or the TCPA permits "prior express consent" to be given: (1) after loan origination on documents such as correspondence, updated information forms, forbearance requests, and the like, and/or (2) verbally, Sallie Mae could effectively reduce the recoverable damages or eliminate them altogether. In addition, even if Plaintiffs prevailed on their interpretation of the FCC's Declaratory Ruling, this is an issue of first impression that, given the amount at stake, would be appealed to the Ninth Circuit and perhaps the Supreme Court.

Another risk Plaintiffs faced going forward is that this Court would decline to certify this case as a class action. Sallie Mae has strenuously denied that class certification is appropriate in this case. Selbin Decl. at ¶ 30. Courts are split and have either granted or denied class certification in TCPA cases depending upon the facts of the case. *Compare Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D. Wash. 2007) (granting class certification) *with Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997) (denying class certification). Sallie Mae took the position, consistent with courts that have denied class certification, that consent is an inherently individual issue that precludes class treatment. While Plaintiffs disagreed with that interpretation, the Court could have refused to certify the class if Sallie Mae were able to present convincing caselaw and facts to support its position, leaving only the named Plaintiffs to pursue their individual claims.

Finally, there is a substantial risk of losing inherent in any jury trial. Even if Plaintiffs prevailed at trial, Defendants would almost certainly appeal, threatening a reversal of any favorable outcome. *See Fulford v. Logitech, Inc.*, No. C-08-2041-MMC, 2010 U.S. Dist. LEXIS

29042, at *8 (N.D. Cal. Mar. 5, 2010) ("[L]iability and damages issues—and the outcome of any appeals that would likely follow if the Class were successful at trial—present substantial risks and delays for Class member recovery.").

Under the Settlement, by contrast, Settlement Class members avoid the above risks and obstacles to recovery and receive substantial benefits. Settlement Class members will receive the unambiguous right to end the telephone calls at the heart of this litigation. Moreover, the claim process for monetary relief is simple and straightforward, requiring only the completion of a simple one-page form.

"In this case, the negotiated amount is fair and reasonable no matter how you slice it. There is no evidence of fraud, overreaching, or collusion." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). "[T]his Settlement . . . guarantees a recovery that is not only substantial, but also certain and immediate, eliminating the risk that class members would be left without any recovery . . . at all." *Fulford*, 2010 U.S. Dist. LEXIS 29042, at *8.

2. <u>The Substantial Amount of Discovery Completed Supports Final Approval of the Settlement</u>

Courts also consider the amount and nature of discovery and evidence developed at the time of settlement in determining whether the Settlement is fair, adequate, and reasonable. *Knight*, 2009 248367, at *4. Courts regularly approve prompt settlements, especially those achieved after thorough pre-filing negotiations. *See, e.g.*, *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 539 (W.D. Wash. 2009); *see also In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (finding that class counsel's significant investigation and research supported approval of settlement, even absent extensive formal discovery); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) ("[F]ormal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement."); *In re Critical Path, Inc.*, No. C 01-00551 WHA, 2002 WL 32627559, at *7 (N.D. Cal. June 18, 2002) ("Through protracted litigation, the settlement class could conceivably extract

more, but at a plausible risk of getting nothing").

In *Pelletz*, like here, the parties engaged in pre-filing investigation, informal discovery, and settlement discussions. *Pelletz*, 255 F.R.D. 537, 539; *see also* Selbin Decl. at ¶ 46. The parties' investigation included the informal exchange of "confidential, proprietary information," plaintiffs' counsel's interviews with absent class members about their experiences and problems with the product, and analysis of the allegedly defective product at issue. *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. at 543. The parties in *Pelletz* undertook these efforts over the course of just over a year. Selbin Decl. at ¶ 46. The pre-filing investigation, informal discovery, and settlement discussions provided "sufficient information to determine the relative strengths and weaknesses of their respective positions" such that "[b]oth sides were well-prepared to reach an adequate settlement and decide on appropriate remedies based on the strengths and weaknesses of their bargaining positions ascertained during the investigation." *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. at 543.

Here, like *Pelletz*, the Settlement is the result of a thorough legal and factual investigation by the parties. Before filing the *Arthur* action in February 2010, Arthur Counsel spent months investigating and researching the relevant legal issues as well as the factual allegations made by consumers. Selbin Decl. ¶¶ 8-15. Similarly, counsel to the *Najafi* Plaintiffs thoroughly investigated the potential claims of the co-signor plaintiffs before filing their Complaint. Declaration of Douglas J. Campion at ¶ 6; Declaration of Joshua B. Swigart at ¶ 5; Declaration of Abbas Kazerounian at ¶ 5. After filing the complaint, Arthur Counsel continued to exchange legal arguments with Sallie Mae, conduct extensive informal and confirmatory discovery from Sallie Mae, and request and receive hundreds of pages of documents. Selbin Decl. ¶¶ 23-25, 37-38. This legal research and related informal discovery permitted Plaintiffs' counsel to further analyze the bases for their claims and confirm class-wide damages. *See id.* Prior to settlement, Plaintiffs' counsel also had contact with more than 100 Sallie Mae customers nationwide. *Id.* at ¶¶ 13, 17, 31. Both sides were well-informed regarding the strengths and weaknesses of their

respective positions.

3. The Positive Recommendation and Extensive Experience of Counsel Support Final Approval of the Settlement

As stated above, a settlement is presumed fair if it was negotiated at arm's length by experienced, competent counsel equipped with enough information to act intelligently. *See also Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 WL 34089697, at *7 (W.D. Wash. Mar. 26, 2001) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced capable counsel after meaningful discovery.") (citing *Manual for Complex Litigation (Third)* § 30.42 (1995)); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 567 (W.D. Wash. 2004) (approving settlement "entered into in good faith, following arms-length and non-collusive negotiations"); *Pelletz*, 255 F.R.D. 542-43 (approving settlement "reached after good faith, arms-length negotiations").

Class Counsel in this case, who are among the most experienced consumer class action attorneys in the country, support the Settlement as fair, reasonable, and adequate, and in the best interests of the Class as a whole. Selbin Decl. at ¶ 56. Indeed, based on Class Counsel's extensive knowledge and experience in litigating similar consumer actions, and Class Counsel's thorough evaluation of the strengths and weaknesses of this case, Class Counsel believe this settlement to be an excellent result. *Id.*

4. Future Expense and Likely Duration of Litigation Support Final Approval of the Settlement

Another factor for the Court to consider in assessing the fairness of a settlement is the expense and likely duration of the litigation had a settlement not been reached. *Officers for Justice*, 688 F.2d at 625. In applying this factor, the Court must weigh the benefits of the Settlement against the expense and delay involved in achieving an equivalent or more favorable result at trial. *See Young v. Katz*, 447 F.2d 431, 434 (5th Cir. 1971).

As discussed above, the Settlement guarantees a substantial recovery for the Settlement

Class while obviating the need for lengthy, uncertain and expensive pretrial practice, trial, and appeals. Even if the Class prevailed against Sallie Mae at trial, Sallie Mae would likely appeal any adverse rulings against it, thus delaying any relief to the Settlement Class for an indefinite amount of time and running up expenses in the form of attorneys' fees and litigation costs.

5. Small Number of Objectors and Nature of the Objections Support Final Approval

The mere fact that there are objections to a settlement does not mean that the Settlement should be rejected. A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it. *See, e.g.*, *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977). Indeed, a court can approve a class action settlement as fair, adequate, and reasonable even over the objections of a large number of class members. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291–96 (9th Cir. 1992). Here, out of a class of 4,884,892 Class Members, only two people have objected to date. Selbin Decl. at ¶¶ 60-61, Exhs. H, I. This *de minimus* level of objection is far smaller than that approved by courts in similar instances. *See Lelsz v. Kavanagh*, 783 F. Supp. 286, 289 (N.D. Tex. 1991) (approving settlement for class of 5,693 where 370 objected); *Parker v. Anderson*, 667 F.2d 1204, 1207 (5th Cir. 1982) (affirming approval of settlement where one class member out of 11 objected).

While the deadline for objection is December 13, 2010, the two objections received to date do not demonstrate that the settlement is anything but fair, adequate, and reasonable. Ms. Veronica Best objects to the forms that require her to list certain identifying information, including her current cell phone number, last four digits of the social security number, Sallie Mae account number, and signature. *See* Selbin Decl., Exh. H. The collection of this information on each form, however, is necessary for the independent settlement administrator to cross-check this information with the information in Sallie Mae's databases, thereby ensuring: (1) that all automated calls to each participating class member's cellular phone will stop, and (2) that each participating class member will receive a cash award or a one-time reduction from the principal

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balance of the class member's Sallie Mae loan. Mr. Carlos Sherrod believes Sallie Mae has wrongly garnished his wages. *See* Selbin Decl., Exh. I. His complaint, however, has nothing to do with the Settlement, as the Settlement neither addresses nor releases claims pertaining to subjects other than calls made to cellular phones through automated telephone equipment.

On November 15, 2010, Class counsel received four *pro se* objections through the Court's ECF system. Class counsel are reviewing them and will respond substantively to these objections, and any additional objections submitted by the December 13, 2010 objection deadline, in Plaintiffs' reply papers due December 17, 2010.

6. Presence of Good Faith, the Absence of Collusion, and the Approval of a Third-Party Mediator Support Final Approval of the Settlement

Courts recognize that arm's-length negotiations conducted by competent counsel with the assistance of a third-party mediator are *prima facie* evidence of fair settlements. As the United States Supreme Court has held, "One may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining . . . ." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999); *see also Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 WL 34089697, at *7 (W.D. Wash. Mar. 26, 2001) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced capable counsel after meaningful discovery."); *see, e.g.*, *In re Phenylpropanolamine (PPA) Products Liability Litig.*, 227 F.R.D. 553, 567 (W.D. Wash. 2004) (approving settlement entered into in good faith, following arms-length and non-collusive negotiations).

Here, the proposed settlement is the result of intensive, arm's-length negotiations between experienced attorneys who are highly familiar with class action litigation in general, and with the legal and factual issues of this case in particular. To reach this settlement, the parties to this action engaged in extensive negotiations, including four full-day, in person mediation sessions with the Honorable Edward A. Infante (Ret.). The discussions culminated in the Settlement. The

recommendation by this neutral party weighs in favor of granting final approval to the Settlement.

B. The Class Members Have Received the Best Notice Practicable.

This Court has already determined that the notice program in this case meets the requirements of due process and applicable law, provides the best notice practicable under the circumstances, and constitutes due and sufficient notice to all individuals entitled thereto.[2] This notice program has been fully implemented by independent claims administrator, The Garden City Group, Inc. ("GCG"). *See* Declaration of Jennifer M. Keough Regarding Notice Dissemination and Settlement Administration ("Keough Decl.") at ¶¶ 3-16.

The parties retained GCG to administer the Settlement and handle the claims process. Counsel for Sallie Mae provided GCG with a list of 4,858,053 Settlement Class members' mailing and email addresses contained in Sallie Mae's loan database(s) in computer readable format ("Class List"). Keough Decl. at ¶¶ 4-5. After receiving this information, the Settlement Administrator updated the Class members' mailing addresses using the National Change of Address database, an Advance Address Search, and/or a reverse phone look up search. *Id.* at ¶ 11. GCG obtained updated mailing addresses for 758,478 Settlement Class members by using these three search methods. *See id.*

From September 29, 2010 to October 7, 2010, GCG sent 1,617,900 Notice Packets via email to Class members who had not opted out of receiving electronic mail from Sallie Mae. Keough Decl. at ¶¶ 6, 9.

From October 6, 2010 to October 14, 2010, GCG sent 3,406,803 Notice Packets via U.S. mail to: (1) Class members whose email notice was undeliverable, and (2) Class members who opted out of receiving electronic mail from Sallie Mae. Keough Decl. at ¶ 12. Skip tracing has been performed by the Claims Administrator for all returned mail. *Id.* GCG has forwarded additional mailed notice to 20,361 persons whose Notice Packets have been returned as

[2] *See* Amended Order Certifying Provisional Settlement Class, Preliminarily Approving Class Action Settlement, and Providing for Notice to the Settlement Class, Dkt. No. 39 ¶¶ 6-7.

undeliverable. *Id.* GCG has completed emailing and mailing the Notice Packets to all potential Settlement Class members, directing them to the dedicated settlement website (http://www.arthurtcpasettlement.com/), toll-free phone number (888-730-7196), and email address (ClaimsAdministrator@ArthurTCPASettlement.com) for further information. *Id.*, Ex. B-C. As of November 12, 2010, notice was successfully sent to all Class members contained in Sallie Mae's databases, a success rate of 100 percent. *Id.* at ¶¶ 3-12. This satisfies the requirements of due process. *See Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

In additional to email and mailed notice, GCG published the Summary Notice in a weekday edition of *USA Today* on both October 7 and 13, and in the Wall Street Journal on October 7, 2010. Keough Decl. at ¶ 13, Exh. D. As of November 10, 2010, approximately 47,586 persons have dialed the toll-free number (*id.* at ¶ 14), approximately 40,591 persons have visited the website (*id.* at ¶ 15), and approximately 1,842 have sent emails to the Settlement administrator. *Id.* at ¶ 16.

In addition, Arthur Counsel received and responded to approximately 2,500 telephone calls and 30 letters from Class members as of November 15, 2010. Selbin Decl. ¶ 41. Arthur Counsel answered all questions regarding the Settlement and assisted many Class Members in completing the revocation and claim forms. *Id.* Arthur Counsel has observed that Class members have generally expressed positive views about the terms of the Settlement and have been pleased that they have the ability to make the automated calls to their cellular phones stop. *See id.*

C. Few Class Members Have Chosen to Opt-Out of the Settlement

Pursuant to the Court's preliminary approval order, any Settlement Class member wishing to be excluded from the Settlement was required to submit a Request for Exclusion to GCG postmarked no later than December 13, 2010. (Dkt. No. 131 ¶ 5B.) As of November 10, 2010, the Claims Administrator had received only 46 Requests for Exclusion from Settlement Class members. Keough Decl. at ¶ 17.

D. At Least 55,974 Settlement Class Members Have Accepted Settlement Relief

As of November 10, 2010, the Claims Administrator has received a total of 39,040 timely-submitted revocation request forms to halt automated calls to their cellular phones. Keough Decl. ¶ 17. As of November 10, 2010, the Claims Administrator has received a total of 55,974 timely-submitted claims for a Monetary Award. Keough Decl. at ¶ 17. While the Claims Administrator has not yet determined the overlap, the substantial number of people claiming settlement relief weighs in favor of final approval.

III. CONCLUSION

Federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs*, 955 F.2d at 1276 ("strong judicial policy . . . favors settlements, particularly where complex class action litigation is concerned"); *see also* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.41 (4th ed. 2002) (gathering cases).

The Settlement that Plaintiffs reached with Sallie is reasonable and fair. Indeed, the ability to completely halt automated calls to Class members' cellular phones in addition to payment to the Class is outstanding in light of the recoveries potentially available under the law and the risks of continued litigation. At the final approval hearing scheduled for 9:30 a.m., on Friday, December 17, 2010, Class counsel will address any remaining questions the Court may have.

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Dated: November 15, 2010

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on November 16, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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